

# COMMITTEE FOR PUBLIC COUNSEL SERVICES

## PERFORMANCE STANDARDS

### GOVERNING THE REPRESENTATION OF INDIGENT PERSONS IN CIVIL COMMITMENT CASES

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c. 211D. Counsel assigned pursuant to G.L. c. 211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

These standards generally describe the steps which should be taken by an attorney who is assigned pursuant to G.L. c. 123, § 5, to represent a person in a civil commitment case who risks a six-month or one year civil commitment in a mental health facility. [See also *CPCS Performance Standards for Authority to Treat Proceedings*.]

1. The role of the attorney in a commitment case is to act as an advocate for the respondent, in opposition to the petition and to insure that the respondent is afforded all of his or her due process and other rights. At a minimum, counsel must insure that the petitioning facility is made to meet its burden of proving, beyond a reasonable doubt, that the respondent meets the criteria for commitment.
2. Immediately upon receipt of the assignment of a case the attorney shall: (a) file an appearance in court; (b) communicate with the client to inform the client of the assignment; (c) arrange to meet with the client (if the attorney's schedule does not permit him or her to meet with the client no later than the next business day and promptly begin to work on the case, the attorney shall decline the assignment); and (d) shall not agree to a continuance of the case without first consulting with the client and obtaining his or her consent.
3. The attorney shall meet with the client as soon as possible, but in no event later than the next business day following the assignment. The purpose of this initial interview is to begin to develop a lawyer-client relationship based on mutual understanding and trust, to explain the commitment law and procedures to the client, to discuss the alternatives to continued hospitalization available to the client, to determine the client's version of the facts which led to the filing of the petition, and to determine the client's wishes regarding the litigation. While not required, the attorney should seek to obtain from his or her client written authorization to examine the client's medical record or, where the client is unable or unwilling to provide such authorization, a court order authorizing such examination. Finally, the attorney shall discuss the possibility of an independent evaluation.
4. If the attorney believes an independent examination will aid the client, and the client agrees to such an evaluation, the attorney shall file a motion for funds for an independent examination by a clinician of the client's choice and at the Commonwealth's expense. The client should be advised that such an examination will take time and may cause delay.
5. The attorney shall contact the independent clinician if a motion for funds is allowed. The attorney shall remind the doctor that his or her report is the property of the client and should be sent to the attorney, and that the report is not to be filed with the court or disclosed to the hospital attorney or staff without the permission of the patient's attorney. See *Commonwealth v. Thompson*, 386 Mass. 811 (1982). The

attorney should also remind the doctor that the purpose of the examination is to evaluate: (i) the client's current mental state; (ii) the likelihood of serious harm if the client were to be discharged; (iii) the client's ability to care for himself outside of the hospital; (iv) the feasibility of any less restrictive alternatives to hospitalization; and (v), if commitment to Bridgewater State Hospital is sought, the need for "strict security."

6. The attorney shall thoroughly investigate the facts. This investigation shall include reading the complete medical records and interviewing the hospital staff, including the doctors, nurses, social workers and other staff. The attorney should also speak to other patients on the ward, friends and family members of the client, and staff of any other programs familiar with the client.

7. The attorney shall use formal discovery mechanisms if indicated and tactically advisable.

8. After reviewing the medical record and the commitment petition the attorney shall determine if any procedural defenses can be raised and, if appropriate, file appropriate motions with supporting memoranda. (Procedural defenses can be raised, for example, if the hospital failed to file the petition at the appropriate time or if the hearing has not been commenced within the four- or fourteen-day time period required by the statute, or if the petition fails to set forth facts in support of the petition. See *Hashimi v. Kalil*, 388 Mass. 607 (1983) and G.L. c. 123, § 7(c)).

9. After developing a thorough knowledge of the law and facts of the case, the attorney shall meet again with his or her client for the purpose of discussing strategy and alternatives to commitment. The attorney shall discuss with the client any available alternatives to commitment. These may include the participation in an out-patient psychotherapy and counseling program, a community support program, a day treatment program, or placement in a less restrictive environment such as a half-way house, a group residence, or an apartment program. The attorney should make it clear to the client that the ultimate decision regarding the proposal of alternatives to commitment must be made by the client. The attorney should reassure the client that the attorney will stand behind the client's decision and forcefully advocate the client's position.

10. After this client meeting, and if appropriate, the attorney shall enter into negotiations with relevant persons concerning the case (e.g., discussions with the treating physician(s) regarding alternatives to hospitalization; discussions with social workers and DMH area office officials or other providers regarding the availability of alternative placements).

11. If the attorney and the hospital can agree to a negotiated settlement the attorney shall meet with his or her client to explain the terms of the agreement and obtain the client's consent to the settlement. Should the client decline the settlement offer, the attorney shall be prepared to try the civil commitment case.

12. Prior to the hearing the attorney shall identify potential witnesses who will testify in support of the client. Where necessary, witnesses should be subpoenaed. The attorney shall meet with the witnesses in advance of the trial in order to prepare them for direct and cross-examination. The attorney shall review the medical record and identify those parts of the record which should not be admitted into evidence. The attorney should determine the identity of the hospital's witnesses in advance of the hearing, and make an effort, if tactically indicated, to interview them on the record and prepare appropriate cross-examination. The attorney shall discuss with the client the desirability of the client testifying. If the client wishes to testify, the attorney shall thoroughly prepare the client for direct and cross-examination.

13. During the hearing the attorney shall act as a zealous advocate for the client, insuring that the proper procedures are followed and that the client's interests are well represented.

14. After the hearing, the attorney shall meet with the client to explain the court's decision. If the client is committed, the attorney shall explain the client's right to appeal pursuant to G.L. c. 123, § 9(a) and the client's right to file a petition for discharge in the superior court pursuant to G.L. c. 123, § 9(b), and shall assist the client in doing so. (Where an appeal is filed the attorney shall, without delay, notify CPCS' Mental Health Litigation Unit in order that appellate counsel may be assigned). The attorney shall review the evidence which was presented at the hearing in order to advise the client about any steps the client can take during the commitment period in order to be discharged from the hospital.